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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

2009 DEC -8 A 8:47

AZ CORP COMMISSION
DOCKET CONTROL

In the matter of:

KYLE SCHMIERER, individually and
doing business as AMADIN, and JANE
DOE SCHMIERER, husband and wife,

Respondents.

DOCKET NO. S-20651A-09-0029

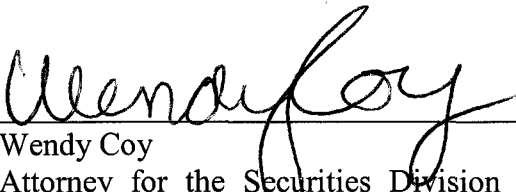
RESPONSE TO:

**1) MOTION FOR SECOND
CONTINUANCE; 2) FOURTH MOTION
TO COMPEL DISCOVERY; AND 3)
MOTION FOR JURY TRIAL**

On November 23, 2009, Respondent filed a series of Motions including a Motion for Second Continuance; Fourth Motion to Compel Discovery; and Motion for Jury Trial. The basis of these Motions has been previously addressed by the Securities Division. In addition, the Administrative Law Judge has issued Procedural Orders that have denied the Respondent's prior Motions on the same topics. All motions should again be denied for the reasons outlined in the attached Memorandum of Points and Authorities.

Respectfully submitted this 8th day of December, 2009.

By:



Wendy Coy

Attorney for the Securities Division of the
Arizona Corporation Commission

Arizona Corporation Commission
DOCKETED

DEC - 8 2009

DOCKETED BY



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Procedural History**

3 On January 29, 2009, the Securities Division of the Arizona Corporation Commission
4 ("Commission") filed a Temporary Order to Cease and Desist and Notice of Opportunity for
5 Hearing, ("TC&D") with respect to Respondent Kyle Schmierer.

6 On February 19, 2009, Respondent filed a Request for Hearing.

7 On February 24, 2009, by Procedural Order, a pre-hearing conference was scheduled for
8 March 23, 2009.

9 On February 26, 2009, Respondent filed an Answer.

10 On March 23, 2009, the pre-hearing conference was held. Administrative Law Judge Stern
11 ("ALJ Stern") recommended that the parties meet and discuss a resolution to this matter. Further, ALJ
12 Stern suggested that the matter be arbitrated or mediated. The parties were to file a motion to either
13 set a hearing date or to set an arbitration/mediation date after meeting to discuss the issues.

14 On March 31, 2009, the Securities Division filed a Motion to Set Hearing. On April 2,
15 2009, Respondent filed a Motion to Set Mediation. A procedural conference was held on April 30,
16 2009. On May 19, 2009, the Third Procedural Order was issued. The Third Procedural Order
17 scheduled a hearing to be held on August 31, 2009 and the exchange of witness and exhibit lists on
18 June 19, 2009.

19 On June 10, 2009, Respondent filed a Motion For Release of Essential Information Before
20 Mediation and a Motion for Mediation.

21 On June 12, 2009, the Securities filed Responses to the motions filed on June 10, 2009 by
22 Respondent. On June 19, 2009, a Fourth Procedural Order was issued addressing Respondent's
23 motions. The Fourth Procedural Order denied Respondent's Motion For Release of Essential
24 Information and held in abeyance the Motion for Mediation.

25 On June 19, 2009, the Securities Division made its witness and exhibits available to
26 Respondent.

1 Also on June 19, 2009, ALJ Stern issued the Fourth Procedural Order denying
2 Respondent's Motion for Release and holding in abeyance Respondent's Motion for Mediation.
3 Further, ALJ Stern granted Respondent's request for additional time to produce his witness and
4 exhibit list. The Fourth Procedural Order affirmed August 31, 2009 as the hearing date.

5 On June 24, 2009, Respondent filed three motions essentially requesting a rehearing on the
6 issues of disclosure of investigative materials, mediation and the demand for an investigation of the
7 Securities Division.

8 On July 2, 2009, the Securities Division filed a Response to Respondent's motions filed on
9 June 24, 2009. In the Response, the Securities Division stated that the issues raised in the June 24,
10 2009 motions had all been addressed in the Response the Securities Division filed on June 12,
11 2009.

12 On July 9, 2009, Respondent filed a Preliminary Witness and Exhibit List. In addition, on
13 July 9, 2009, Respondent also filed a Motion to Delay Deadline for Witness and Exhibits and the
14 Trial and a Motion To Begin A Formal Investigation Into The Abuse Of Power And Extortion By
15 The Securities Division Immediately. The issue of an investigation against the Securities Division
16 was addressed in the Responses filed by the Securities Division on June 12, 2009 and July 2, 2009.

17 On August 12, 2009, Respondent filed a Motion: Oral Contract of Mediation Option Must
18 Be Upheld. In addition, Respondent filed a Motion to Dismiss Hearing/Jury Trial for my Case and
19 re-filed the Motion to Delay Deadline for Witness and Exhibits and The Trial and Motion to being
20 a formal investigation into the abuse of power and extortion by the Securities Division Immediately
21 and Motion: Demand that Promise of Mediation Option be Upheld. The Securities Division
22 responded to the Motion for Mediation on June 12, 2009. In addition, the Securities Division
23 addressed Respondent's motion for jury trial and an investigation into the Securities Division in the
24 June 12, 2009 Response. Furthermore, the Securities Division again addressed these same issues
25 with its July 2, 2009 Response.
26

1 On August 21, 2009, Respondent filed a Motion for Continuance for New Trial Date and
2 Motion to Compel Discovery. The Securities Division responded on August 25, 2009.

3 On August 24, 2009, Respondent filed a Motion to Dismiss This Case and Sanctions for
4 Malicious Prosecution, Motion for Sanctions for Failure to Comply with Discovery and Motion to
5 Assert My Constitutional Rights and Demand for a Jury Trial. The Securities Division filed its
6 Response to the Motions on August 27, 2009.

7 On August 31, 2009, 8:51 a.m., (the day of the scheduled hearing schedule do to begin at
8 10:00 a.m.) Respondent filed the following: Motions: Motion for Immediate Dismissal and Severe
9 Sanctions, Motion My Constitutional Rights to a Jury Trial Remain Inviolate and Motion for
10 Continuance – Future Jury Trial Date or Case Must be Dismissed Immediately.

11 On August 31, 2009, after Respondent failed to appear at the scheduled hearing, ALJ Stern
12 granted the Motion to Continue over the objections of the Securities Division.

13 On September 3, 2009, the Securities Division filed a Response to: 1) Motion: My
14 Constitutional Rights to A Jury Trial Remain Inviolate; and 2) Motion for Continuance – Future
15 Jury Trial Date or Case Must Be Dismissed Immediately. Also on September 3, 2009, the
16 Securities Division filed a Response to: Motion for Immediate Dismissal & Severe Sanctions.

17 On October 16, 2009, ALJ Stern issued the Fifth Procedural Order (Reschedules a
18 Hearing). Through the Fifth Procedural Order, ALJ Stern denied all previous Motions filed by
19 Respondent except the Motion to Continue filed on August 31, 2009. The Fifth Procedural Order
20 rescheduled the administrative hearing to January 21, 2010.

21 On November 23, 2009, the Respondent filed the following Motions: 1) Motion for Second
22 Continuance; 2) Fourth Motion to Compel Discovery; and 3) Motion for Jury Trial.

23 **II. Motion for Second Continuance**

24 Respondent requests that the administrative hearing rescheduled to January 21, 2010 be
25 continued. The Respondent asserts that he is attending classes at “College” and will be unavailable
26

1 until May of 2010. However, no documentation has been provided by the Respondent related to the
2 "College" he attends and his class schedule.

3 Pursuant to A.A.C. R14-4-109(Q), "upon a showing of good cause" a hearing may be
4 continued. Respondent has not provided a "showing of good cause" why this matter should be
5 continued again. The Respondent was initially served the TC&D on January 29, 2009 and
6 requested a hearing on February 20, 2009. A hearing was scheduled and a deadline to exchange
7 witness and exhibit lists was set. The Securities Division provided its witness list and copies of all
8 exhibits to the Respondent on or about June 19, 2009. The Respondent has had ample opportunity
9 to prepare for the pending hearing.

10 Without a showing of good cause, the hearing should go forward on January 21, 2010 as
11 ordered.

12 **III. Fourth Motion to Compel Discovery**

13 The Respondent asserts in his Fourth Motion to Compel Discovery that he is missing
14 information to prepare for the upcoming hearing. Respondent has filed numerous motions
15 requesting the same information he is requesting in the present Motion. ALJ Stern denied
16 Respondent's previous motions seeking additional information in both the Fourth Procedural Order
17 dated June 19, 2009 and the Fifth Procedural Order dated October 16, 2009.

18 The Respondent has repeatedly requested the contact information for Special Investigator
19 Peggy Scozzari. This information has been available to him at least since Investigator Scozzari
20 provided her business card to the Respondent in February of 2009. Further, the Securities Division
21 listed Investigator Scozzari in its witness list. Moreover, in its Responses dated August 25, 2009,
22 August 27, 2009 and September 3, 2009, the Securities Division again informed Respondent on the
23 contact information for its sole witness, Investigator Peggy Scozzari.

24 The Securities Division has provided the Respondent with the contact information and
25 copies of the exhibits that it plans to use to present its case. Unnamed employees of the Securities
26 Division and the court reporter have no knowledge of the facts of whether the Respondent offered

1 or sold securities in violation of the Arizona Securities Act ("Act"). Respondent's Fourth Motion to
2 Compel Discovery should be denied.

3 **IV. Motion for Jury Trial**

4 Respondent's Motion for Jury Trial filed on November 23, 2009 has been addressed in
5 previous responses¹ filed by the Securities Division. In addition, ALJ Stern has previously denied²
6 similar motions filed by the Respondent requesting a jury trial.

7 The Respondent again cites to the Arizona Constitution as authority for his demand for a
8 jury trial in this matter. However, this matter is an administrative matter in an administrative
9 forum. There is no right to a jury trial.

10 The United States Supreme Court has held that jury trials are not available in an
11 administrative proceeding. *See Tull v. United States*, 481 U.S. 412, 418, n.4, 107 S.Ct. 1831
12 (1987)(citing *Atlas Roofing Co. v. Occupational Safety and Health Review Com'n*, 430 U.S. 442
13 (1977) (the Seventh Amendment of the United States Constitution is not applicable to
14 administrative proceedings)). The Arizona legislature enacted the Act, gave the Commission
15 authority to enforce the Act and provided for procedures under the Act to further the duties of the
16 Commission. The legislature did not provide for a jury trial in administrative proceedings. This is
17 an administrative proceeding. There is no basis for a jury trial in an administrative matter.

18 Respondent's motion must again be denied.

19 **V. Conclusion**

20 The only new motion filed by the Respondent relates to the Motion for Second continuance.
21 The rest of the motions filed by Respondent on November 23, 2009 have had responses filed and the
22 ALJ has ruled on those previous motions. All motions filed by Respondent on November 23, 2009
23 should be denied.

24
25
26 ¹ See Securities Division Responses filed on June 12, 2009, July 2, 2009, August 27, 2009 and September 3, 2009.
² See Fifth Procedural Order dated October 16, 2009.

1 Respondent's due process rights have not been violated. Respondent has the opportunity to
2 question the witness and challenge the evidence presented by the Securities Division related to the
3 allegations set forth in the TC&D that was filed on January 29, 2009 at the scheduled hearing.

4 Respectfully submitted this 8th day of December, 2009.

5
6 By:


Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 8th day of December, 2009 with:

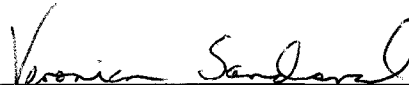
3 Docket Control
4 Arizona Corporation Commission
5 1200 W. Washington St.
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered
8 filed this 8th day of December, 2009 to:

9 Mr. Marc E. Stern
10 Administrative Law Judge
11 Arizona Corporation Commission/Hearing Division
12 1200 W. Washington St.
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed
15 this 8th day of December, 2009 to:

16 Kyle Schmierer
17 220 West Behrend Dr.
18 Phoenix, AZ 85027

19 
20 _____